Supreme Court, U.S.
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No. 92-1332

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

CAPTRAN CREDITORS TRUST, CLUB BAHA, LTD. and TROPICAL PROPERTIES, LTD.,
Petitioners,

v.

DAVID W. McCONNELL, GERARD A. McHALE JR. and McHALE, EZZELL & CO., P.A.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS, GERARD A. McHALE JR., and McHALE, EZZELL & CO. P.A.

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I

QUESTIONS PRESENTED

IS ANY BASIS FOR THE EXERCISE OF THIS COURT'S DISCRETIONARY CERTIORARI JURISDICTION PRESENTED BY THIS CASE WHERE: (1) THE TRUST AGREEMENT'S LIMITATION OF TRUSTEE LIABILITY IS GOVERNED BY FLORIDA AND NOT FEDERAL LAW OR POLICY; (2) THE CIRCUIT COURT AFFIRMED, WITHOUT OPINION, THE BANKRUPTCY AND DISTRICT COURTS' DETERMINATION THAT THERE WAS NO ACTIONABLE BREACH OF ANY DUTY UNDER ANY STANDARD, THUS MOOTING THE APPLICABILITY OF THE LIMITATION OF LIABILITY CLAUSE, AND (3) THE CLAUSE IS VALID IN ANY EVENT?

PARTIES TO THE PROCEEDING

All parties in the Court below are listed in the caption of the cause in this Court. Respondent, McHale, Ezzell & Co., P.A., is a professional corporation having no parent or subsidiaries within the meaning of the Supreme Court Rule 29.1. Petitioner, Club Baha, Ltd., is a wholly owned subsidiary of Petitioner, Tropical Properties, Ltd.

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STATEMENT OF THE CASE

Course of Proceedings Below

This cause began as an adversary proceeding in the reorganization of Captran Creditors' Trust, Debtor (CCT) in the Bankruptcy Court of the Middle District of Florida, on a three count Complaint by Petitioners, CCT, Club Baha, Ltd., (Club Baha) and Tropical Properties, Ltd. (Tropical) against David McConnell (McConnell) and these Respondents, Gerald McHale (McHale) and McHale, Ezzell & Co., P.A. (the P.A.). (A. 2a, 20a).[1]

1 (A.) shall refer to the appendix to the Petition.

Count I was based upon allegations of breach of fiduciary duty owed to Petitioners by McConnell and McHale. Count II alleged professional negligence against McHale and McConnell. Count III sought relief under §722, Florida Statutes (1985), against McConnell, McHale and the P.A. (A. 20a-21a). Count III was dismissed by the Bankruptcy Court after trial. (A. 2 la). That dismissal is not implicated in any way in the question sought to be posed by Petitioners.

Although a default was entered against McConnell for failure to timely file an answer in the Bankruptcy Court, a Final Judgment was not entered against McConnell because " . . . there was no meaningful evidence presented by the Plaintiff concerning any conduct by McConnell who is a Co-Trustee . . .". (A. 28). That judicial action is not implicated in the question sought to be posed by the Petitioners.

The Bankruptcy Court entered its findings Of fact, conclusions of law and memorandum opinion in favor of McHale and the P.A. on April 4, 1990. (A. 20a and 29a).

Petitioners' appealed to the United States District Court for the Middle District of Florida, which affirmed the judgment below on June 17, 1991. (A. 2a). In affirming, the District Court used the standard of appellate review which requires that the findings of fact of the Bankruptcy Court are not to be set aside unless clearly erroneous. Bankr. R. 8013; *Anderson v. City of Bessemer*, 470 U.S. 564, 574-575, 84 L.Ed 2d 518, 519 105 S.Ct. 1504, 1512 (1985). However, the District Court applied an independent *de novo* review of all conclusions of law and the legal significance to be accorded to the facts. *E.g., In re: Owen*, 86 B.R. 691, (M.D. Fla. 1988). (A. 3a).[2]

Respondents then appealed to the United States Court of Appeals for the Eleventh Circuit. On November 10, 1992, the

2. Aff'd 877 F.2d 44 (llth Cir. 1989), rev'd, other grounds *Owen v. Owen*, __U.S.__, 114 L.Ed 2d 350, 111 S. Ct. 1833 (1991).

Circuit Court affirmed the District Court without a written opinion under Eleventh Circuit Rule 36-1. (A. la)[3]

STATEMENT OF THE FACTS

Preliminary Statement

Petitioners avoid the facts as found by the District Court and affirmed by the Eleventh Circuit. Instead, Petitioners sponsor an incomplete, erroneous and selective combing of the evidence presented in the Bankruptcy Court and the findings of both the Bankruptcy and District Courts. Instead of the District Court's opinion as affirmed by the Eleventh Circuit, which is the focal point of certiorari jurisdiction, Petitioners attempt to rely upon rhetoric and unsupported contentions. (A. la 2a-19a).

Respondents are mindful of the admonishment of Supreme Court Rule 15.1. However, to confront all of the misstatements and contentions advanced by the Petition, which were rejected below, would render this Brief in Opposition far too lengthy. The facts as found by the District Court and affirmed by the Eleventh Circuit come to this Court with a presumption of correctness. Because a Brief in Opposition is not a brief on the "merits," this Court's initial inquiry is focused upon facts and law " . . . which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." S.Ct. R. 15.1. Respondent's Statement of the Facts will be directed toward that consideration, as well as Supreme Court Rule 10.1.

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3. 11th Cir. R. 36-1, as applicable to this case, provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> ***
>
> (e) judgment has been entered without an error of law;
>
> and an opinion would have no precedential value, judgment or order may be affirmed or enforced without opinion.

The Facts

Contrary to the implications of the Petition, and the artful phrasing of the Question Presented in the Petition, this case does not concern " . . . Federal public policy for Trustees in a federal bankruptcy proceeding . . . ". CCT was a Trust organized under the laws of the State of Florida. Respondents never functioned as Trustees under the supervision of any bankruptcy court or any federal court.

CCT was organized to use assets of Captran Resorts International, Inc. (CRI) to satisfy creditors of CRI outside of the jurisdiction of the Bankruptcy Court. The major creditor of CRI, and CCT was Club Baha (controlled by Jack Grobowsky). (A. 3a -4a).

Contrary to the implication at page 3 of the Petition, McHale was not the primary negotiator of the agreement for Club Baha. As found by the District Court on uncontested facts, the " . . . major author . . . " and the ". . . chief author of the legal structure of the Trust . . ." was Attorney Massari, who represented Grobowsky and Club Baha. (A. 4a). The District Court and the Bankruptcy Court specifically noted that the Trust Agreement was the product of extensive negotiations between parties of equal bargaining power. (A. 7a, 14a, 16a). As stated by the Bankruptcy Court (A. 27a):

> There is no doubt that Grobowsky was a highly sophisticated businessman, and the parties were of equal bargaining power. This was certainly an arms' length transaction. The Trust beneficiaries cannot argue that they were either ill-represented or unsophisticated.

CRI's Chapter 11 case was dismissed December 6, 1982 following finalization of the Trust Agreement. (A. 4a). The stated purpose of CCT was:

> . . . liquidating the assets transferred to it with no objective to continue or engage in the conduct of a trade or business. (A. 6a).

The Trust Agreement also limited the Trustee's liability:

> Except for proven dishonesty, a Trustee shall not be personally liable for any act or omission in connection with his duties as Trustee. (A. 7a).

McHale and McConnell were appointed Trustees. It was considered that McHale was aligned with Club Baha and Grobowsky, and McConnell was aligned with CRI. (A. 5a).

The Trust was not liquid at the time of its inception. It consisted of CRI's assets, and liabilities connected with those assets. The assets were mainly 1400 time share unit weeks at 5 resort properties, land which had not been developed, two mortgage portfolios and a promissory note. Although the beneficiaries were CRI's creditors, CRI retained a residual interest in the CCT properties if any remained after liquidation and satisfaction of the interests of the Trust beneficiaries. (A. 5a).

The land in Sanibel Island Beach Club (SIBC) was a major asset of CCT.[4] SIBC was designed as a multiple building development to be built in phases. (A. 5a). One building was almost completed but had not been granted a certificate of occupancy (Bldg. 10) . Permits for two more buildings had been issued (Bldgs. 8 and 9). Sanibel Island enforces a Rate Growth Ordinance (ROGO) which affects the time and extent of development which is allowed. The land for SIBC Buildings 5, 6 and 7 was an assert of the Trust, but building permits had not been issued. Although the Trust owned the land, CRI (the original debtor) owned the development rights to all SIBC land. The undisputed evidence showed that CRI would not have put the land comprising SIBC 5, 6, 8 and 9 into the Trust if it had not expected a return of a residual interest in the Trust at termination after payment of creditors. The Lee County, Florida Building Department had previously approved the actual construction of Buildings 8 and 9 and the building permits would

4. It was due to the efforts of McHale prior to accepting appointment as a Trustee that this asset was included in the trust assets.

have been lost if the development had not proceeded. (A. 5a).

The assets of the Trust were to be marketed and sold for the beneficiaries of the Trust. The Trust specifically called for CRI to receive 38 percent marketing fee based upon the sale price of the property and allowed for the CCT properties to be sold at 10 percent discount. Any other discounts were deducted from CRI's marketing fee. The Trust always received 62 percent of the net sale proceeds. Actual sales of CCT properties were handled by a real estate title agent controlled by Trowbridge, North American Title Insurance Agency, Inc. (NATIA) (A. 6a).

Contrary to the Petition's attempted implication at p. 3, McHale was not engaged as a CPA by Club Baha during his tenure as Co-Trustee, neither was the P.A. in any way a Co-Trustee. There was no engagement letter, there was no agreement to act as a CPA for Club Baha, and the expert testimony credited by the District Court and the Bankruptcy Court was that the actions of McHale did not amount to acting as a CPA. (A. 17a-18a, 26a-27a).

In 1983 CRI continued to develop Buildings 8 and 9 at SIBC with the consent of McHale who believed that it would maximize return to the Trust beneficiaries. Although the Trust Agreement did not authorize any such additional development, far from hurting the Trust, this continued development resulted in a net benefit to the Trust of $1.7 million dollars. (A. 7a).

In 1983, both of the Trustees and Grobowsky attempted to sell the assets of the Trust in bulk, but they could not find a buyer. The Trustees then attempted a distribution of the Trust assets in kind. This distribution was resisted by CRI because of its residual interest in the Trust assets after creditors were paid. CRI threatened litigation, and the Trustees filed a state court action for declaratory relief requesting court approval of a distribution in kind and a temporary restraining Order in an effort to remove CRI as marketing agent for Trust assets. (A. 7a, 24a). However, Grobowsky withdrew his support for the action shortly after it was begun and an order denying the restraining Order was entered by the Circuit

Court on March 8, 1984.[5]

During the pendency of the state court action, several beneficiaries of CCT assigned their beneficial interest to Club Baha, which then held over 90 percent of the creditors' claims under the Trust. Grobowsky then discharged McHale and McConnell as Trustees and appointed successor Trustees. These hand-picked Trustees then reached an agreement to transfer the bulk of CCT's assets to Club Baha in exchange for Club Baha's interest in the Trust. (A. 8a).

The transfer to Club Baha was interrupted by an involuntary petition in bankruptcy filed against CCT by parties claiming to be creditors. After the Bankruptcy Court ruled that CCT was a business Trust which could file for bankruptcy (*In re: Captran Creditors' Trust*, 53 B.R. 741 (M.D. Fla. 1985)), CCT consented to conversion to a voluntary Chapter 11. Following this conversion, Club Baha and Grobowsky proposed a plan of total liquidation which was confirmed. This plan resulted in an in-kind distribution of the CCT assets to the beneficiaries, which distribution was very similar to the one originally planned by McConnell and McHale. (A. 8a-9a).

At page 4, the Petition attempts to paint a picture of McHale accepting records without question from CRI's comptroller, Mills. Although the Bankruptcy Court stated that McHale granted " . . . almost a complete free reign to Trowbridge, Mills and NATIA involving sales of Trust assets, sales closing, and record keeping of the Trust assets . . . . " (A. 26a), this statement does not equate to accepting record keeping without question or verification. Although the records were kept by Mills of CRI, the trial testimony was that McHale required much extra documentation, and that he would not sign deeds on timeshare sales without being satisfied that the records were complete. This is reflected in the District Court's findings:

5. The evidence shows that Club Baha would have received the beginning of substantial pay-outs from the closings in SIBC 8 and 9. However, these closings were prevented by Grobowsky's refusal to release Club Baha's judgment lien in the state court action.

> The Trustees received weekly sales reports of Trust inventory, monthly schedules of closed sales, monthly balances in escrow, cumulative showings of use of escrow funds for development and construction purposes, escrow draw approvals and draw requests from the construction company. In addition, the Trustees met approximately bi-weekly with Mills. (A. 6a).

Pages 4-7 of the Petition constitute only contentions by the Petitioners concerning alleged defaults by McHale, and out-of-context quotations from the Bankruptcy Court's Order, to the exclusion of the District Court's findings and Order, which was affirmed by to the Eleventh Circuit.

There was absolutely no link between any of the alleged actions by McHale and any alleged damages to the Trust. Not only were the claimed damages refuted by the Respondent's, Petitioners called no appraisers or other witnesses to establish the Trust's value before and after the original Trustees were terminated. Petitioners could not even show that any meaningful rescission of time share sales occurred as a result of Trustee actions. (A. 9a). As recognized by the District Court, no actions by McHale resulted in any harm to the Petitioners:

> The Bankruptcy Court ruled that the appellants did not sustain their burden of proof to establish that McHale breached his duty. That ruling followed many months of evidentiary hearings in which the parties had ample opportunity to present extensive evidence and testimony. The Bankruptcy Court reached that determination in spite of sharp criticism about McHale's performance as Trustee of the Captran Creditors' Trust. (A. 13a).

Footnote 3 at page 5 of the Petition is but one example of Petitioners' distortion of the facts in this case. There was no "fire sale" of assets, as reflected by the lack of any such findings in either the Bankruptcy Court Order or the District Court Order. The facts show that the loan portfolio at issue was actually sold for a

much larger amount of mortgages receivable. The portfolio was rapidly decreasing in value because time share buyers would quit paying on the mortgage. The Trust was to replace the paper with substitute paper to maintain their collateral reserve. This loan portfolio would only have come back to the Trust if all of the mortgages had paid completely out at the end of the mortgage period.

At its inception, the Trust had zero liquidity. But at the time McHale was terminated, CCT had $1,824 in cash, $346,268 in escrow awaiting the release of Grobowsky's lien to close, which he refused to do, and $972,089 in mortgage notes receivable also awaiting release of Grobowsky's lien to close, which he refused to do.

The Trust Agreement provided for Club Baha to receive 62 percent of net proceeds after reserving funds for administration expenses and after payment of the first and second tier of creditors under the Trust Agreements. At the time Grobowsky prevented the closing, tier one and two of beneficiaries had been paid, and the Trustees were ready to pay the third tier which included Club Baha. The net result of the obstructive tactics used by Grobowsky was to take control of the $1.3 million dollar Trust and, through hand picked successor Trustees, to completely cut out CRI from its residual rights under the Trust.

The most disingenuous aspect of the Petition is its distorted portrayal of the District Court's ultimate determination as affirmed by the Eleventh Circuit. Petition, p. 8. Neither the District Court nor the Eleventh Circuit were under any "misunderstanding." The District Court's conclusions of law came after ". . . an independent *de novo* review of all conclusions of law and the legal significance accorded to the facts." (A. 3a).

Although the Bankruptcy Court did criticize certain aspects of McHale's performance as Trustee, it clearly rejected the Petitioners' claim that McHale breached any duty, much less *any duty* as measured by the liability limitation clause of the Trust. (A. 25a-27a). It was Petitioners' contention throughout that McHale should be judged by a higher standard which incorporated his sta-

tus as a CPA. (A. 26a). The Bankruptcy Court clearly rejected any claim of breach of duty *even if* McHale were judged as a "CPA Trustee":

> Alternatively, assuming without admitting that if McHale is judged as a CPA Trustee, this Court is satisfied that the expert testimony presented at trial showed that McHale did not, in fact, fall below the standards of a CPA, and the Plaintiffs did not prove otherwise by clear and convincing evidence. (A. 27a).

Again, the District Court also unequivocally held that, as a matter of fact and law, McHale did not breach any duty which resulted in any proven damage to the Petitioners. (A. 13a).

With respect to the limitation of liability or "exculpatory" clause the District Court affirmed the Bankruptcy Court and upheld the clause although it was not required to address the clause in light of its primary decision, on *de novo* review of legal issues, that there was no breach of *any* duty. (A. 16a). Its holding that the limitation of liability provision of the Trust Agreement was valid constituted only an alternative ground that was essentially *dicta*:

> . . . this Court finds nothing clearly erroneous about the Bankruptcy Court's conclusion that McHale did not breach his duty as Trustee of the Captran Creditors' Trust. The lower Court's conclusion is well supported by the fact that the CCT was not an ordinary Trust. Moreover, McHale had an unenviable task of administering a Trust in which the parties actively participated while protecting competing interests. (A. 14a).
>
> The next issue for discussion is the exculpatory clause in the Trust Agreement. This court reviews that issue without conceding that a breach occurred to invoke that provision of the Trust Agreement. Technically, any consideration of the exculpatory clause is moot until appellants prove that a predicate breach occurred resulting in injury. (A. 14a).

SUMMARY OF ARGUMENT

I

The Trust at issue in this cause is governed by Florida substantive law. Accordingly, the attempt by the Petition in its Question Presented and throughout to present this matter as one involving federal law and policy is totally without merit. Accordingly, the decision sought to be reviewed presents no basis for the exercise of this Court's discretionary certiorari jurisdiction under Supreme Court Rule 10, or otherwise.

II

Any issue concerning the limitation of trustee liability clause in the Trust Agreement, as sought to be presented by the Question Presented in the Petition, is moot. The District Court, following *de novo* legal review of legal conclusions applied to the facts, unequivocally held that McHale, as Trustee, breached no duty whatsoever. This conclusion was affirmed by the Circuit Court. Manifestly, this Court is not a court of select errors designed to grant additional appellate review to disgruntled litigators.

III

Regardless of the fact that application of the limitation of liability clause is moot under the District Court findings, affirmed by the Court of Appeals, its alternative determination that the clause was valid is correct.

This was not a normal "trust," but an attempt by competing and often antagonistic interests to work out the debt problem of CRI *outside* the jurisdiction of the Bankruptcy Court. The Trust Agreement, including the limitation of liability clause, was the result of long negotiations between antagonistic parties of equal bargaining power. Similar types of exculpatory clauses have been upheld by courts.

REASONS WHY THE PETITION SHOULD BE DENIED

I
NO COGNIZABLE FEDERAL LEGAL OR POLICY ISSUES ARE PRESENTED BY THE DECISION BELOW.

Despite the Petition' s attempt to couch the Question Presented in terms of ". . . federal public policy for trustees in a federal bankruptcy proceeding, . . .", it is quite evident that neither the case as a whole or the decisions below present any cognizable federal issue or controversy for this Court's determination. This is true with respect to the considerations of Supreme Court Rule 10, and the purpose of discretionary certiorari review generally. CCT was a business trust established under and governed by the substantive law of Florida, including all issues related to the duty of Trustees, breach of that duty, and the validity of any limitation of liability clause contained in the Trust Agreement.

The fact that CCT was placed into bankruptcy under Chapter 11, and the issues surrounding Petitioners' claims were tried in the Bankruptcy Court, does not operate to convert issues controlled solely by state law to a case involving either federal law or federal policy. Resolution of such issues under state law has no bearing whatsoever upon the resolution of any similar issues with respect to bankruptcy trustees, or any other trustee subject to federal law.

The Petitioners' attempt to manufacture a federal policy within the narrow confines of this case in order to attempt a wholesale retrial of the merits of the case in this Court, is, in a word, spurious. The assertion at page 8 of the Petition (p. 8) that "[t]his case presents a serious question of federal public policy that goes to the very heart of bankruptcy law . . ." constitutes more than disingenuous argument, it is a deliberate misrepresentation.

II
THE LIMITATION OF LIABILITY CLAUSE IN THE TRUST AGREEMENT IS NOT AT ISSUE BECAUSE OF THE ABSENCE OF ANY BREACH OF DUTY UNDER ANY STANDARD.

In essence, Petitioners are simply seeking a total retrial of their claims and rhetoric which have been rejected by three courts. Even a cursory review of the contentions of the Petition, and the Orders of the Bankruptcy and District Court, discloses a litigious disagreement with factual findings which were affirmed by the Circuit Court which saw no basis for even writing an opinion.

Indeed, as noted by the District Court, in light of the fact that there was no competent evidence presented by Petitioners to establish any breach under any standard, ". . . any consideration of the exculpatory clause is moot." (A. 14a).

This factual finding, affirmed by the Circuit Court, comes to this Court with the presumption of correctness. In order to address the question presented by the Petition, this Court would have to engage in an independent fact finding review process and reach a contrary conclusion on the issue of breached duty *vel non*.

Another example of the Petition's attempt to treat this Court as a mere appellate court of errors, is its treatment of Respondent, McConnell, at the close of the Petition at p. 13. The Petition presents no facts concerning Trustee McConnell because, as aptly noted by the Bankruptcy Court, it presented no evidence concerning his execution of his duties. (A. 28a). As stated by the District Court (A. 17a):

> The Bankruptcy Court did not enter a Final Judgment against McConnell. It held that appellants presented no meaningful evidence concerning McConnell's conduct as co-Trustee. In light of that, the Bankruptcy Court decided it was inappropriate to enter a judgment against McConnell.

> JThis Court holds as a matter of law that Judge Paskay correctly exercised his discretion in not entering final judgment against appellee McConnell. The disposition of a motion for entry of a default judgment lies within the court's sound discretion. *Mason & Hanger-Silas Mason Co. v. Metal Trades Council*, 726 F.2d 166 (5th Cir. 1984). Generally, the Court considers a variety of factors when exercising its discretion for entry of a default judgment. This Court favors decisions on the merits and finds no reason to conclude that Judge Paskay abused his discretion in withholding final judgment against appellee McConnell.

In reality, the Petition presents mere assertions, obviously in hope that this Court will retry issues determined in the Bankruptcy Court, reviewed under proper standards by the District Court, and affirmed by the Circuit Court under circumstances where the Circuit Court felt that an opinion would have *no precedential value*. In ignoring the stated basis for the District Court's decision as affirmed by the Circuit Court, Petitioners lose sight of the fact that courts of appeal are not just way points on the road to this Court. This Court does not act as a mere appellate tribunal to review questions of fact of interest only to the parties themselves. *See, e.g., NLRB v. Hendricks City Royal Electric Membership Corp.* , 454 U.S. 170, 176 n. 8, 70 L.Ed 2d 323, 330 (n. 8), 102 S.Ct. 216 (1981); *United States v. Johnston*, 268 U.S. 220, 227, 69 L.Ed 925, 926, 45 S.Ct. 96 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

The Petition is nothing more than a final exhortation by disgruntled litigants which serves only to further exhaust the time and resources of Respondents and this Court.

III
THE LIMITATION OF LIABILITY CLAUSE IS VALID IN ANY EVENT.

The limitation of liability clause is valid, notwithstanding the fact that application of the clause became moot because of the absence of credible proof of an actionable breach of duty under *any* standard. (A. lla-14a).

Both the Bankruptcy Court and the District Court correctly analyzed the factors to be considered in enforcing the clause under the particular facts of this trust arrangement and correctly applied the facts to the law:

> Exculpatory clauses as a general rule are neither for or against public policy. Each exculpatory clause deserves independent review based on many considerations. Foremost in any review is the language of the exculpatory clause and whether it applies to the instant case. Other factors include, but are not limited to: how the exculpatory clause limits liability, intent of the parties, and the manner in which the exculpatory clause was made a part of the agreement.
>
> The Bankruptcy Court accurately summarized the law concerning exculpatory clauses. The Courts have upheld exculpatory provisions in trust agreements. *Morrisey v. Curran*, 483 F.2d 480 (2nd Cir. 1973), cert. denied 414 U.S. 1128 (1974) *See also, Koelentus v. Avco*, 798 F.2d 949 (7th Cir. 1986), cert. denied 479 U.S. 1032 (1987). Generally, exculpatory clauses are construed according to their plain meaning against the trustee. *Knauer v. Barnett*, 360 So. 2d 398, 405 (Fla. 1978). Exculpatory clauses will not save a trustee from liability for certain breaches deemed especially reprehensible, for example, willful and intentional breaches, acts of bad faith, dishonesty, acts of gross negligence, and the like. G. Bogert, *Trusts*, 94 (6th ed. 1988). (A. 15a).

From the beginning, CCT was not a normal "trust." It was an attempt to resolve CRI's debts outside of bankruptcy. It involved an attempt to balance competing and often antagonistic interests represented by Grobowsky and Club Baha on the one hand and Trowbridge and CRI on the other. (A. 14a).

Of necessity, any analysis of the validity of the Trust Agreement's limitation of liability clause must include a strong emphasis on the following undeniable fact, as noted by the District Court:

> The exculpatory clause in the instant case was part of a Trust Agreement produced through extensive negotiations. The parties were in equal bargaining positions, knowledgeable and represented by counsel. Further, appellant's attorney was instrumental in drafting the Trust agreement. (A. 16a).

Again, given the validity of the Trust Agreement, in order to reverse the Circuit Court, this Court would have to act as a superior court of select errors and review the voluminous evidence and transcripts below. It would be required to overturn factual determinations made and affirmed below that there was no actionable breach of duty by McHale under *any* trustee standard, including the higher standard of a so-called ". . . CPA Trustee . . ." (A. [11a-14a,] 27a).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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